



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JR545/15

In the matter between:

RINSA (PTY) LTD t/a ULTRA CITY MIDDLEBURG

Applicant

and

**NATIONAL UNION OF METALWORKERS
OF SOUTH AFRICA**

First Respondent

GIFT MSIZA

Second Respondent

STEPHEN SHEMA MOLAPO N.O

Third Respondent

DISPUTE RESOLUTION CENTRE

Fourth respondent

Heard: 31 October 2018

Delivered: 05 December 2018

Summary: Review application – employer’s decision to offer a plea deal must not be motivated by bad faith.

JUDGMENT

NKUTHA-NKONTWANA. J

Introduction

- [1] The applicant, Rinsa (Pty) Ltd t/a Ultra City Middleburg (Rinsa), seeks an order reviewing and setting aside the arbitration award issued by the third respondent (arbitrator) under case number MP18820, dated 30 January 2015. In the award, the commissioner found that the dismissal of second respondent, Mr Gift Msiza (Mr Msiza), a member of the first respondent, National Union of Metalworkers of South Africa (NUMSA), was substantively unfair and ordered his reinstatement.
- [2] Rinsa's main impugn is that the commissioner patently misconceived the nature of the enquiry and rendered an unreasonable arbitration award. NUMSA opposes the review application.

Review test

- [3] The review test is encapsulated in *Head of the Department of Education v Mofokeng*,¹ and the following passages are relevant:

'[30] The failure by an arbitrator to apply his or her mind to issue which are material to the determination of a case will usually be an irregularity. However, the [SCA] in *Herholdt* ... and this court in *Gold Fields* ... have held that before such an irregularity will result in the setting aside of the award, it must in addition reveal a misconception of the true enquiry or result in the setting aside of the award. It must in addition reveal a misconception of the true enquiry or result in an unreasonable outcome...

[31] ... Moreover, judges of the Labour Court should keep in mind that it is not only the reasonableness of the outcome which is subject to scrutiny. As the SCA held in *Herholdt*, the arbitrator must not misconceive the inquiry or undertake the inquiry in a misconceived manner. There must be a fair trial of the issues.' (Emphasis added)

¹ [2015] 1 BLLR 50 (LAC); see also *Herholdt v Nedbank Ltd (Congress of South African Trade Unions as amicus curia)* [2013] 11 BLLR 1074 (SCA) and *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation and Arbitration and others* [2014] 1 BLLR 20 (LAC).

Pertinent facts and evaluation

- [4] Mr Msiza was employed by Rinsa as a petrol attendant. He was charged and dismissed for misconduct relating to involvement in a fraudulent transaction which occurred on 20 September 2014. Mr Msiza was implicated by Ms Mnguni, a fellow petrol attendant, as being part of the fraudulent transaction.
- [5] On the day in question, there was a taxi and a truck that filled diesel from pump 15 in one continuous transaction and were assisted by Ms Mnguni. The taxi driver paid in cash for the diesel but the whole transaction was charged on the truck drivers bank card belonging to the truck owner. Ms Mnguni testified that the cash that she received from the taxi driver was shared between Mr Msiza, the truck driver and herself. The evidence of a video footage showed Mr Msiza assisting Ms Mnguni to pour diesel into the truck.
- [6] Mr Froneman, Rinsa's director, testified that he confronted both Mr Msiza and Ms Mnguni about the incident. Ms Mnguni readily admitted her involvement but the applicant denied his part in the fraudulent transaction. Mr Msiza testified that he was just assisting Ms Mnguni and that there was nothing sinister as petrol attendants do assist each other, a fact conceded by Mr Froneman.
- [7] Ms Mnguni, on the other hand, testified that she had planned the fraudulent transaction with Mr Msiza. She was not dismissed solely because she had agreed to testify against Mr Msiza even though fraud is a dismissible offence in terms of Rinsa's disciplinary code. In fact, Rinsa's representative categorically put it to Mr Msiza in his cross examination that:

'We knew that this case is going to land up in an arbitration and we knew that you are involved in underhanded issues and therefore she [Ms Mnguni] was given... What would you call it? Call it amnesty if you want. That is the reason why she was not dismissed. Because if

we had come to this arbitration and we did not have her evidence we would not be able to win this case.’²

[8] In *MEC: Department of Health, ECP v PHSDSBC and Others*,³ this Court endorsed the concept of plea bargaining in the labour law context and held that it does not constitute inconsistent application of discipline. However, the Court was emphatic that the exercise of that discretion should not be informed by *mala fides* and hinted that the decision to offer a plea deal were not fairly exercised would include:⁴

- (a) that the evidence the witness gave was not reasonably necessary to secure a guilty finding against the accused employees, including because such evidence was readily available from other sources;
- (b) an imbalance in the relative degree of culpability of the witness and the accused employees, such that the proverbial 'big fish' was used to secure a guilty finding against the 'little fish';
- (c) that the decision to conclude a plea agreement was induced by an improper motive such as obvious favouritism or capriciousness; and/or
- (d) unfair racial, gender or other discrimination in favour of the accomplice witness or against the remaining accused employees.

[9] In the present case, there is a glaring imbalance in the comparative degree of blameworthiness of Ms Mnguni, a 'big fish', and Mr Msiza, a 'little fish'. The commissioner was, accordingly, on point in treating Ms Mnguni's evidence with caution.

[10] Ms Mnguni also testified that all her colleagues were involved in fraudulent activities and her evidence in this regard went as follows:

² Transcript, p 96 lines 1-6.

³ [2016] ZALCPE 9; [2016] 6 BLLR 621 (LC); (2016) 37 ILJ 1429 (LC) at paras 38 to 42.

⁴ *Supra* at para 41.

'And then while I was trying to filling up the truck with the pump this side then Gift [Mr Msiza] came approaching. That was not a problem because it was how we worked there. We are looking at each other. If Gift maybe he has got a plan, if someone will go there he will assist him so that they can share the money. Like if maybe there is a need for a receipt of R2000.00 and I do not have it I will go to Gift before I go to the console and "Gift do you have ...a receipt of diesel". The he is saying no and then I go someone else. And the he will say no... Or someone else has got it...receipt then I will give the customer and then the customer would give me my share and I would share with that person. It is how we are working. We are looking after each other.'⁵

- [11] When teased about this in cross examination, Ms Mnguni refused to divulge the names of the other employees involved in fraudulent transactions because they were not caught. Strangely, she is the one who implicated Mr Msiza but refused to assist Rinsa to deal with other fraudsters. The commissioner correctly found that Rinsa's case was solely hinged on Ms Mnguni's evidence as the video footage did not show Mr Msiza participating in the fraudulent transaction. Conversely, Ms Mnguni conceded in cross examination that she is the one who initiated and executed the fraudulent transaction. To the extent that Mr Msiza was seen assisting her, it would seem that it was common practice that petrol attendants would assist each other.
- [12] The commissioner's credibility finding against Ms Mnguni cannot be faltered. Ms Mnguni failed to open up to her employer and the arbitration on the identity of other employees involved in fraudulent transactions. Her confession was clearly self-serving.
- [13] On the issue of relief, there is no merit in Rinsa's assertion that reinstatement was not be appropriate because it no longer trusts Mr Msiza. Rinsa pardoned Ms Mnguni, a self-confessed 'big fish' fraudster, who implicated all its employees in fraudulent activities.

⁵ Transcript p 38 lines 18 -25 and p 39 lines 1-3.

Conclusion

[14] In all the circumstances, I am conceived that the award falls within the band of reasonable outcomes and must stand. Parties did not pursue costs and I will not labour on this issue.

[15] In the premises, I make the following order:

Order

1. The review application is dismissed.
2. There is no order as to costs.

P Nkutha-Nkontwana

Judge of the Labour Court of South Africa

Appearances:

For the applicant: Ms S Lancaster

From: Lancaster Kungoane Attorneys

For the first respondent: Mr Nkhangweni Masutha, NUMSA Official

LABOUR COURT